

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	NO. CV-04-3047-LRS
)	
v.)	
)	ORDER GRANTING PLAINTIFF'S
)	MOTION FOR SUMMARY JUDGMENT
CHARLES MC CLURE, aka CHUCK)	
MC CLURE,)	
)	
Defendant.)	
)	

BEFORE THE COURT is Plaintiff's Motion for Summary Judgment. (Ct. Rec. 14). The Plaintiff, United States of America, is represented by Frank Wilson. The Defendant, Charles McClure, is represented by Rex Tabler. This motion was heard without oral argument. After careful review of the pleadings, exhibits, and declarations submitted by both parties, the Court finds that there are no genuine issues of material fact, and Plaintiff is entitled to summary judgment and injunctive relief as a matter of law for the reasons set forth below.

I. BACKGROUND

On April 29, 2004, the United States filed a lawsuit against Charles McClure seeking to eject the Defendant from the National Forest Lands upon which he had been residing without authority. Complaint (Ct. Rec. 1) at ¶1. The Complaint seeks the removal of

1 all structures, equipment, motor vehicles, and personal property
2 not necessary for or reasonably incident to, mineral exploration,
3 and for an injunction prohibiting Defendant from occupying or
4 conducting mining activities on National Forest System Lands
5 without authorization from the Forest Service. *Id.* Further, the
6 government seeks any monetary damages caused to the property
7 resulting from Mr. McClure's unauthorized occupancy. *Id.*

8 Defendant McClure and William Lancaster filed documents
9 locating the unpatented Clarissa mining claim on the National
10 Forest Lands on approximately January 2, 2000. Ct. Rec. 1 at ¶8.
11 Defendant's Answer (Ct. Rec. 4) at ¶8. It is undisputed that the
12 parcels are on federal land. Defendant sent the Forest Service a
13 letter expressing his intent to conduct mining activities on the
14 Clarissa mining claim. The Forest Service interpreted the letter
15 as a proposed plan of operation. Ct. Rec. 1 at ¶9; Ct. Rec. 4 at
16 ¶9.

17 By letter dated June 28, 2001, the Forest Service informed
18 Defendant that his residential occupancy on the Clarissa mining
19 claim was not authorized. On October 10, 2001, Defendant submitted
20 a plan of operation, which included the use of a 23-foot trailer
21 on the mining claim for housing purposes and construction of a 12-
22 foot deck in front of the trailer, and a storage area. Ct. Rec. 1
23 at 13. *See also* Defendant's answer. (Ct. Rec.4). The Forest
24 Service did not approve residential occupancy or the building of
25 structures. *See* Ct. Rec. 4. The Forest Service sent Defendant
26 several letters (August 6, 2002, September 3, 2002, and October 4,
27 2002,) informing Defendant that his residential occupancy and
28 construction on the site were not approved, and that he was not in

1 compliance. Declaration of Richard Stearns (Ct. Rec. 16) at page
2 3. In a letter dated November 14, 2002, the Forest Service
3 approved the original operations and certain things asked for in
4 the October 2001 amended Plan of Operations. As the United States
5 emphasizes in its briefing, the approved activities were
6 specifically set out in the letter and did not include occupancy
7 of the site or the placement of a travel trailer or related
8 structures.¹ Nor did it include the myriad of personal property
9 that Plaintiff brought to the site. Declaration of Richard Stearns
10 (Ct. Rec. 16) Attachment J23. The letter also stated that the
11 approval expired on November 1, 2003. *Id*; See also Supplemental
12 Declaration of Richard Stearns, (Ct. Rec. 46-2) at ¶6. The record
13 also includes photographs of the site taken at various times. Ct.
14 Rec. 46-2, Exhibit C. The record is clear that Plaintiff has
15 removed some of his materials, including the travel trailer.
16 Declaration of Charles McClure (Ct. Rec. 42), Supplemental
17 Declaration of Richard Stearns, Ct. Rec. 46-2). According to
18 Defendant's own declaration, he has extensive personal property
19 located on national forest land, including, but not limited to
20 plastic swimming pools, blue plastic barrels, five gallon plastic
21 buckets, plastic pipe, metal roofing, metal boxes, motorized fans,
22 wood stove and stove pipe, shovels, gas and electric pumps,
23 generators wheel barrows, wash tubs, garbage cans, and metal
24 fencing. McClure Declaration (Ct. Rec. 42) at ¶14. See Ct. Rec. 42

26
27 ¹Despite the clear language of the letter, Defendant argues
28 the travel trailer was approved. That issue is moot as the parties
agree that the travel trailer has now been removed from federal
lands.

1 for a full recitation of the materials currently on national
2 forest lands.

3 II. STANDARDS OF LAW

4 A. Summary Judgment Standard

5 Under Rule 56c, summary judgment is proper "if the pleadings,
6 depositions, answers to interrogatories, and admissions on file,
7 together with the affidavits, if any, show that there is no
8 genuine issue as to any material fact and that the moving party is
9 entitled to a judgment as a matter of law." Fed.R.Civ.Pro. 56c.
10 In ruling on a motion for summary judgment the evidence of the
11 non-movant must be believed, and all justifiable inferences must
12 be drawn in the non-movant's favor. *Anderson v. Liberty Lobby,*
13 *Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986). However,
14 when confronted with a motion for summary judgment, a party who
15 bears the burden of proof on a particular issue may not rest on
16 its pleading, but must affirmatively demonstrate, by specific
17 factual allegations, that there is a genuine issue of material
18 fact which requires trial. *Celotex Corp. v. Catrett*, 477 U.S.
19 317, 324 (1986). The party must do more than simply "show there is
20 some metaphysical doubt as to the material facts." *Matsushita*
21 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)
22 (footnote omitted). "Where the record taken as a whole could not
23 lead a rational trier of fact to find for the nonmoving party,
24 there is no 'genuine issue for trial.' " *Id.* at 587. This
25 court's function is not to weigh the evidence and determine the
26 truth of the matter but to determine whether there is a genuine
27 issue for trial. There is no issue for trial "unless there is
28 sufficient evidence favoring the non-moving party for a jury to

1 return a verdict for that party." *Anderson*, 477 U.S. at 249.
2 Summary judgment must be granted "against a party who fails to
3 make a showing sufficient to establish the existence of an element
4 essential to that party's case, and on which that party will bear
5 the burden of proof at trial." *Celotex*, 477 U.S. at 322. To be
6 cognizable on summary judgment, evidence must be competent."
7 *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1028
8 (9th Cir. 2001) (quoting Fed. R. Civ. P. 56(e)).

9 *B. Standard for Injunctive Relief*

10 In order to qualify for permanent injunctive relief,
11 Plaintiff must establish "irreparable injury and the inadequacy of
12 legal remedies." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312,
13 (1982) (citations omitted). To meet this standard:

14 [T]he plaintiff must establish actual success on the merits,
15 and that the balance of equities favors injunctive relief. That
16 is, the plaintiff seeking an injunction must prove the plaintiff's
17 own case and adduce the requisite proof, by a preponderance of the
18 evidence, of the conditions and circumstances upon which the
19 plaintiff bases the right to and necessity for injunctive relief.
20 *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998), cert.
21 denied, 119 S. Ct. 1140 (1999) (quoting *Orantes-Hernandez v.*
22 *Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990)).

23 Injunctive relief "'is not a remedy which issues as of
24 course,' or 'to restrain an act the injurious consequences of
25 which are merely trifling.'" *Weinberger*, 456 U.S. at 312
26 (citations omitted). "Injunctive relief is proper only if monetary
27 damages or other legal remedies will not compensate the plaintiffs
28 ///

1 for their injuries." *Walters*, 145 F.3d at 1048 (citations
2 omitted).

3 **III. DISCUSSION:**

4 The Mining Law of 1872 provides The statutory right to mine
5 on public lands is long-standing:

6 [A]ll valuable mineral deposits in lands belonging to the
7 United States, both surveyed and unsurveyed, shall be free and
8 open to exploration and purchase, and the lands in which they are
9 found to occupation and purchase, by citizens of the United States
10 and those who have declared their intention to become such, under
11 regulations prescribed by law, and according to the local customs
12 or rules of miners in the several mining districts, so far as the
13 same are applicable and not inconsistent with the laws of the
14 United States. 30 U.S.C. § 22. The 1872 Act also reserves to a
15 mineral claimant "the exclusive right of possession and enjoyment
16 of all surface included within the lines of their locations." *Id.*
17 at § 26. See also *U.S. v. Good*, 257 F.Supp. 2d 1306, 1308 (D.
18 Colo. 2003).

19 However, this right is limited, as Congress has broad power
20 to regulate land within the public domain, *Kleppe v. New Mexico*,
21 426 U.S. 529, 538-39(1976), and a necessary ancillary to this
22 power is the authority to "protect (public lands) from trespass
23 and injury and to prescribe the conditions upon which others may
24 obtain rights" *Utah Power & Light Co. v. United States*,
25 243 U.S. 389, 405 (1917). Congress, in the exercise of this
26 authority, has enacted legislation reserving to the United States
27 the right to manage vegetative surface resources on an unpatented
28 claim and specifically stating that any mining claims " shall not

1 be used . . . for any purposes other than prospecting, mining or
2 processing operations and uses reasonably incident thereto." 30
3 U.S.C. s 612 (1970). *See Converse v. Udall*, 399 F.2d 616, 617 (9th
4 Cir. 1968), cert. denied, 393 U.S. 1025 (1969). Explained a bit
5 more succinctly, holders of valid mine mining claims have a
6 property interest in federal lands, but the interest only allows
7 uses of the land that are reasonably incident to mining. 30
8 U.S.C. section 612.; *see also Teller v. United States*, 113 F.273,
9 280-81 (8th Cir. 1901).² "If a person's occupancy is not
10 reasonably incident to mining, it is unlawful." *United States v.*
11 *Allen*, 578 F.2d 236 (9th Cir. 1978). "[T]he important interest in
12 developing mineral resources on public lands under the mining law
13 may come into conflict with the equally important interest in
14 protecting our National Forests for future use." *U.S. v.*
15 *Brunskill*, 792 F.2d 938, 939 (1986); *see also U.S. v. Good*, 257
16 F.Supp. 2d 1306 at 310. Mr. McClure does not dispute that the
17 "United States Forest Service is empowered by the Multiple Use Act
18 to exercise certain regulatory controls." Defendant's Motion in
19 Opposition to Summary Judgment (Ct. Rec. 41) at 2.

20 The Forest Service has promulgated regulations for the
21 purpose of setting "forth rules and procedures through which use
22 of the surface of National Forest System lands in connection with
23 operations authorized by the United States mining laws (30 U.S.C.

25
26 ² The law is clear that federal lands may not be used for
27 other purposes. *See e.g. United States v. Bagwell*, 961 F.2d 1450
28 (9th Cir.1992) (affirming the eviction of a mill site claimant
holding under an unpatented claim where the site was used
"primarily for residence and livestock purposes rather than mining
or milling purposes")

1 [§§] 21-54), . . . shall be conducted so as to minimize adverse
2 environmental impacts on National Forest System surface
3 resources." 36 C.F.R. § 228.1. See also *United States v.*
4 *Brunskill*, 792 F.2d at 941.

5 36 C.F.R. § 228.4(a) provides that "a notice of intention to
6 operate is required from any person proposing to conduct
7 operations which might cause disturbance of surface resources.
8 Such notice must be filed with the District Ranger having
9 jurisdiction over the area where the proposed operations will
10 occur. Where the District Ranger determines that such operations
11 will likely cause significant disturbance of surface resources,
12 the operator shall submit a proposed plan of operations to the
13 District Ranger." *Id.*

14 It is well settled that mining activities likely to cause
15 such disturbance cannot be carried on in the absence of an
16 approved operating plan. See *United States v. Goldfield Deep*
17 *Mines Co. of Nevada*, 644 F.2d 1307 (9th Cir.1981), cert. denied,
18 455 U.S. 907, (1982).

19 Defendant contends that there are genuine issues of material
20 fact which preclude summary judgment. First, Defendant alleges
21 that he moved his travel trailer from the site in early 2005.
22 McClure Declaration (Ct. Rec. 42 at ¶14), and therefore, the issue
23 is moot. (Ct. Rec. 42) The government acknowledges that the
24 travel trailer has been removed from the premises. (Ct. Rec. 46-
25 2). However, the analysis does not end with whether the
26 Defendant's travel trailer is still on the land. According to
27 Defendant's own declaration, he has extensive personal property
28 located on national forest land, including, but not limited to

1 plastic swimming pools, blue plastic barrels, five gallon plastic
2 buckets, plastic pipe, metal roofing, metal boxes, motorized fans,
3 wood stove and stove pipe, shovels, gas and electric pumps,
4 generators wheel barrows, wash tubs, garbage cans, and metal
5 fencing. McClure Declaration (Ct. Rec. 42) at ¶14. Therefore, it
6 is clear from the undisputed record that the issue is not moot.

7 Defendant further argues that if the Court finds that the
8 issue is not moot, he is simply using the land in good faith, and
9 that the materials he has on the property are "reasonably incident
10 to mining." Ct. Rec. 41 at 4-8. Defendant cites to *United States*
11 *v. Shumway*, 195 F.3d 1093 (9th Cir. 1999) to support his position.
12 However, the case in *Shumway* is distinguishable from the case at
13 bar. In *Shumway*, the Forest Service had significantly raised the
14 *Shumway's* bond amount, and there was some question about whether
15 the Forest Service had done so arbitrarily. Moreover, the Forest
16 Service stated that the *Shumways* could no longer stay on the land,
17 when in a previous operating plan which had been approved, the
18 Forest Service required someone to stay on the land and supervise
19 mining operations for safety reasons. These facts, along with
20 others in the record, created genuine issues of material fact,
21 which made summary judgment inappropriate in that instance. It is
22 interesting to note that in dicta, however, the *Shumway* Court
23 opined that an injunction would be a more appropriate remedy. *Id*
24 at 1108.

25 Unlike in the *Shumway* case, there are no such factual issues
26 in Defendant McClure's case, which would preclude Plaintiff's
27 summary judgment. Defendant further argues that the issue of
28 whether his extensive materials on the land are incident to mining

1 creates a genuine issue of material fact for trial. While the
2 record before the Court suggests that the materials are not
3 reasonably incident to mining, the Court need not reach this issue
4 when deciding the motion for summary judgment. In *U.S. v.*
5 *Brunskill*, the Ninth Circuit affirmed the lower court's decision
6 that the Defendant did not have an approved plan of operation, and
7 consequently, the Forest Service could properly direct Defendant
8 to remove the structures from federal land. *Id* at 941.

9 In Mr. McClure's case, the Defendant was informed that
10 pursuant to federal regulations any mining activity that "might
11 cause significant surface resource disturbance must be conducted
12 according to a Plan of Operations approved by the Forest Officer."
13 (Ct. Rec. 16) Attachment J6 to Exhibit A of Stearns Declaration.
14 In addition, Ct. Rec. 16 Attachment J7 includes Mr. McClure's
15 response with a copy of the Attachment J6 attached, which
16 demonstrates that Mr. McClure received the correspondence. As the
17 government points out in its Motion for Summary Judgment, Mr.
18 McClure was also sent another letter which enclosed a copy of the
19 regulation requiring an approved Plan of Operation if surface
20 resources would be significantly disturbed. *Id* at Attachment J17.
21 In addition, Defendant was sent numerous letters telling him that
22 he was not in compliance, and that his activities were
23 unauthorized. See Plaintiff's Statement of Material Facts (Ct.
24 Rec. 17) at ¶ 6-14. As demonstrated by the record, particularly
25 the Stearns Declaration (Ct. Rec. 16), the Supplemental Stearns
26 Declaration (Ct. Rec. 46-2), and the various photographs of the
27 property taken throughout the years. (Ct. Rec. 46-2, Exhibit C),
28 it appears that the District Ranger properly determined that Mr.

1 McClure is causing significant disturbance to surface resources
2 and, as the government contends, must have an approved Plan of
3 Operations to conduct any mining activities on the claim.

4 The next question is whether Mr. McClure had such an approved
5 plan in place. The record is clear that Mr. McClure's approved
6 Plan of Operations expired on November 1, 2003. Because there is
7 no approved Plan of Operations currently in effect, the Defendant
8 does not have authority to have those materials on federal lands.
9 *See Brunskill, supra.*

10 For the aforementioned reasons, it is **HEREBY ORDERED:**

11 Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is
12 **GRANTED**. Furthermore:

13 1. Defendant is ordered to terminate his residential
14 occupancy, if any, of the federal lands within **thirty** days of the
15 entry of the order of this Court.

16 2. Defendant is ordered to remove from the subject lands
17 all personal property, including but not limited to motor
18 vehicles, structures, equipment and chemicals and to restore the
19 subject lands to their natural state within **thirty** days of the
20 entry of the order of this Court; or in the alternative, to pay
21 the Plaintiff United States the costs of taking such actions;

22 3. The Plaintiff United States is permitted to take
23 possession of all personal property, including but not limited to
24 motor vehicles, structures, equipment and chemicals not removed by
25 the Defendant within **thirty** days of the date this order is
26 entered, and dispose of such personal property without further
27 order of this Court, notice, or administrative action.

28 ///

5. The Defendant is **HEREBY ENJOINED** from occupying and using under the color of the United States mining laws, the federal lands at issue in this case, unless hereafter specifically authorized in writing by the United States under an Approved Plan of Operations. Moreover, Defendant is further prohibited from occupying or using other federal lands without first complying with all applicable federal laws and regulations.

6. Reimbursement to the United States for costs incurred in restoring the federal lands to their natural state if the Defendant fails to timely abide by this Court's order may be pursued in the form of a motion, or in a separate action if necessary to comply with applicable law.

IT IS SO ORDERED. The Clerk is hereby directed to file this Order, enter Judgment in favor of the Plaintiff, and furnish copies to counsel.

DATED this 27th day of September, 2006.

s/Lonny R. Suko

LONNY R. SUKO
UNITED STATES DISTRICT JUDGE